79-1444

Supreme Court, U. S.
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In the
SUPREME COURT OF THE UNITED STATES
October Term, 1979
No. 79-

FRANCES LETO ZANGRILLO,

Petitioner,

-against-

GORDON M. AMBACH, as Commissioner
of Education of the State of New York,
and the President and Board of Trustees
of FASHION INSTITUTE OF TECHNOLOGY,

Respondents.

Petition for a Writ of Certiorari to The Court of Appeals of the State of New York

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Respondents,

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

Petitioner, Frances Leto Zangrillo, prays that a writ of certiorari issue to review the final order of the Supreme Court of the State of New York, Appellate Division, Third Department, entered June 4th, 1979, affirming the judgment herein dated March 8th, 1978 of said Supreme Court, held in and for the County of Albany; and the decision of the Court of Appeals of the State of New York, dated December 17, 1979, denying petitioner permission to appeal thereto from said Appellate Division order of affirmance.

OPINIONS BELOW

There are no appellate opinions herein. The New York Court of Appeals decision herein of December 17, 1979 denying petitioner's motion for permission to appeal thereto is not yet published. The decision of the Supreme Court of the State of New York, Appellate Division, Third Department, herein of May 17, 1979 which, without opinion, affirmed the trial court judgment is reported at 70 AD2d 790; 416 N.Y. Supp. 2d 159. The Special Term memorandum decision herein of Supreme Court, Albany County of March 3, 1978 has not been reported. However the administrative adjudication reviewed by Special Term, viz., the New York State Commissioner of Education's Decision No. 9511, is officially reported in the New York State Education Department Reports at 17 Ed. Dept. Rep. 98.

Copies of the New York Court of Appeals decision denying petitioner permission to appeal of December 17, 1979, the Appellate Division's order of affirmance dated June 4, 1979, and the Special Term judgment of dismissal herein dated March 8, 1978 are set forth in that order in Appendix A of this petition.

Copies of the decision of unanimous affirmance without opinion of the Appellate Division dated May 17, 1979, the memorandum decision herein of Special Term dated March 3, 1978, and the Commissioner's Decision No. 9511 of September 28, 1977, are set forth in that order in Appendix B of this petition.

JURISDICTION

The decision of the Court of Appeals of the State of New York was made on December 17, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. §1257 (3).

QUESTIONS PRESENTED

I. Was it a violation of petitioner's procedural due process rights under the Fourteenth Amendment of the Constitution of the United States for the State to successively deny her both an administrative and a judicial review of the merits of her colorable claims seeking remediation for her respondent public employer's violation of her property rights as a statutorily tenured teacher by summarily terminating her at the end of a semester's resummption of teaching following an overstayed maternity leave?

It is undisputed that petitioner's departmental chairman had promised her the first full-time position to open in the department if petitioner would, in the meantime, accept a part-time teaching assignment on faculty, and petitioner agreed.

II. Was it a violation of petitioner's substantive due process rights under the Fourteenth Amendment of the Constitution of the United States for respondent State community college to have summarily terminated petitioner, without charges or hearing and contrary to the explicit provisions of the special tenure statute applicable to that public employer, for the purpose of making way for the advancement of untenured part-time and evening personnel?

At the time of termination petitioner was told she was being laid off for lack of available work—permissible under the tenure statute. But years later a memorandum to the college president was discovered to her which baldly stated the real, illicit reason for the termination,

> "* * * Mrs. Zangrillo had given up her rights and seniority voluntarily to stay home. The other Part-Time members of the department were felt to have seniority if any full-time openings became available * * *. In addi-

tion, several evening instructors had been offered daytime teaching opportunities as they became available and were being trained to come in. * * *"

REASON FOR GRANTING THE WRIT

This is a case where a state court has decided a federal constitutional question of substance, *viz.*, the right of a statutorily tenured teacher in public employment to be protected against summary termination without hearing or charges, and to an administrative or judicial review of the merits of such termination, all answered negatively and probably not in accord with applicable decisions of this Court, e.g., *Connell v. Higginbotham,* 403 U.S. 207 (1971); *Board of Regents v. Roth,* 408 U.S. 564 (1972); *Perry v. Sindermann,* 408 U.S. 593 (1972).

CONSTITUTIONAL PROVISION AND STATUTES WHICH THE CASE INVOLVES

United States Constitution; U.S.C. Constitution, Amend. 13-14, page 33:

AMENDMENT XIV.—CITIZENSHIP; PRIVILEGES AND IMMUNITIES; DUE PROCESS; EQUAL PROTECTION; APPORTIONMENT OF REPRESENTATION; DISQUALIFICATION OF OFFICERS; PUBLIC DEBT; ENFORCEMENT

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor

deny to any person within its jurisdiction the equal protection of the laws.

* * *

McKINNEY'S CONSOLIDATED LAWS OF NEW YORK, ANNOTATED; BOOK 16, EDUCATION LAW

Article 52, CITY SCHOOL DISTRICTS;

§2587. Tenure in fashion institute of technology

1. The following words and phrases, as hereinafter used, and for the purposes of this section, shall have the following meanings:

a. "Community college" shall mean fashion institute of technology, a community college sponsored by the board of education of the city of New York.

b. "Board" shall mean the board of trustees of fashion institute of technology.

c. "Instructional staff" shall mean the persons employed in the community college in the positions of president, dean, director, assistant dean, assistant director, chairman of department or division, senior instructor, instructor, lecturer, college registrar, college bursar, laboratory technician, college administrative assistant, instructor technologist, college librarian, assistant librarian; or in any position which the board in its discretion may add thereto.

d. "Tenure" shall mean the right of a person to hold his position during good behavior and efficient and competent service, and not to be removed therefrom except for cause in the manner hereinafter provided.

* * *

8. A position held by a person upon whom tenure is conferred through the operation of this section may be

abolished or discontinued by the board for reasons which are not discriminatory against a particular person or persons. In the event that a position in a specified subject is to be abolished or discontinued, such position shall be that of the person last appointed to such position; provided, however, that all persons in such position upon whom tenure is not conferred by the operation of this section shall be dismissed before the position of any other person in such subject is abolished or discontinued. If the board abolishes or discontinues the position of a person upon whom tenure is conferred through the operation of this section and can find no position in the community college which can be efficiently and capably filled by such person, then his name shall be placed and shall remain for three years on a preferred eligible list of candidates for reappointment to fill a vacancy that may thereafter occur in a position which can be efficiently and capably filled by such person or to fill a newly created position which can be efficiently and capably filled by such person. Reappointment from such preferred eligible list to a position in a specified subject shall be made in the order of the original appointment of the persons on such preferred eligible list. Any person reappointed from such preferred eligible list shall be reappointed at a salary not less than that which he was receiving when his position was abolished or discontinued. Any person whose name is placed on such preferred eligible list as hereinbefore provided shall, for the purpose of maintaining his status in any retirement system of which he is a member, be deemed to be on leave of absence without pay.

9. Persons granted tenure under the provisions of this section shall not be removed except for cause, after a hearing and by a majority vote of the board. Charges against a person entitled to tenure under the provisions of this section may be preferred by the president, any member or members of the board, or the board itself. Such charges

and all specifications of such charges shall be filed with the board, which shall cause a copy thereof to be served upon the person accused, and such person shall have ten days from the date of the service of such charges and specifications, or such additional time as may be granted him by the chairman of the board, in which to file an answer in writing with the board. Any person against whom charges as herein provided are filed with the board, may be suspended with or without pay by the president pending a final determination of such charges by the board. The board shall proceed to try and determine such charges either by the board, or by a trial committee consisting of one or more members of the board, or by a trial committee consisting of one or more persons specially appointed for such purpose by the board, and the board shall fix the penalty or punishment, if any, to be imposed for the offense, and such penalty or punishment may consist of a reprimand, a fine, suspension for a fixed time without pay, or dismissal; provided, however, that a vote of a majority of all the members of the board shall be necessary to impose a penalty or punishment. The report of any trial committee holding such trial shall be subject to final action by the board, each member of which shall before voting read the testimony and the evidence in the case. The board may reject, confirm or modify the conclusions of the trial committee, and the decisions of the board shall be final, except that any person aggrieved may review the determination of said board only by an appeal to the commissioner of education, as provided for by article seven of this chapter. In case the charges preferred against any person are dismissed, he shall be restored to his position with full pay for the period of his suspension. In all trials and investigations authorized by this section all testimony taken shall be under oath, which the chairman of the board or the chairman of the trial committee is hereby authorized to administer. For the purpose of any in-

vestigation, trial or hearing, the chairman of the board or the chairman of the trial committee shall have power to subpoena witnesses, papers and records. The Supreme Court shall have power, upon the application of the chairman of the board or the chairman of the trial committee, to compel any witness who may be summoned, to appear and testify before said board or trial committee.

Added L. 1957, c. 429, eff. April 12, 1957.

Education Law, Article 7—COMMISSIONER OF EDUCATION;

§305. General powers and duties.

The commissioner of education is hereby charged with the following powers and duties:

1. He is the chief executive officer of the state system of education and of the board of regents. He shall enforce all general and special laws relating to the educational system of the state and execute all educational policies determined upon by the board of regents.

* * *

L. 1947, c. 820, eff. July 1, 1947.

§308. Other powers

The commissioner of education shall also have power and it shall be his duty to cause to be instituted such proceedings or processes as may be necessary to properly enforce and give effect to any provision in this chapter or in any other general or special law pertaining to the school system of the state or any part thereof or to any school district or city. He shall possess the power and authority to likewise enforce any rule or direction of the regents.

L. 1947, c. 820, eff. July 1, 1947.

§310. Appeals or petitions to commissioner of education and other proceedings.

Any party conceiving himself aggrieved may appeal by petition to the commissioner of education who is hereby authorized and required to examine and decide the same and the commissioner of education may also in-

stitute such proceedings as are authorized under this article. The petition may be made in consequence of any action:

1. By any school district meeting.

2. By any district superintendent and other officers, in forming or altering, or refusing to form or alter, any school district, or in refusing to apportion any school moneys to any such district or part of a district.

3. By a county treasurer or other distributing agent in refusing to pay any such moneys to any such district.

4. By the trustees of any district in paying or refusing to pay any teacher, or in refusing to admit any scholar gratuitously into any school or on any other matter upon which they may or do officially act.

5. By any trustees of any school library concerning such library, or the books therein, or the use of such books.

6. By any district meeting in relation to the library or any other matter pertaining to the affairs of the district.

6-a. By a principal, teacher, owner or other person in charge of any school in denying a child admission to, or continued attendance at, such school for lack of proof of required immunizations in accordance with section twenty-one hundred sixty four of the public health law.

7. By any other official act or decision of any officer, school authorities, or meetings concerning any other matter under this chapter, or any other act pertaining to common schools.

L. 1947, c. 820, eff. July 1, 1947. Amended L. 1976, c. 857, §1, eff. Oct. 24, 1976; L. 1979, c. 443, §5, eff. July 1, 1980. The 1979 amendment added subsection 6-a.

McKINNEY'S CONSOLIDATED LAWS OF NEW YORK, ANNOTATED BOOK 7B, CIVIL PRACTICE LAW AND RULES

ARTICLE 56, APPEALS TO THE COURT OF APPEALS

§5601. Appeals to the court of appeals as of right

(a) Dissent, reversal or modification. An appeal may be taken to the court of appeals as of right in an action originating in the supreme court, a county court, a surrogate's court, the family court, the court of claims or an administrative agency, from an order of the appellate division which finally determines the action, where (i) there is a dissent on a question of law in favor of the party taking such appeal, or (ii) such order directs a reversal of the judgment or order appealed from, or (iii) such order directs a modification thereof in a substantial respect, which is within the power of the court of appeals to review on such appeal, and the party taking the appeal is aggrieved by the modification.

(b) Constitutional grounds. An appeal may be taken to the court of appeals as of right:

1. from an order of the appellate division which finally determines an action where there is directly involved the construction of the constitution of the state or of the United States; and

2. from a judgment of a court of record of original instance which finally determines an action where the only question involved on the appeal is the validity of a statutory provision of the state or of the United States under the constitution of the state or of the United States.

* * *

§5602. Appeals to the court of appeals by permission.

(a) Permission of appellate division or court of appeals. An appeal may be taken to the court of appeals by

permission of the appellate division granted before application to the court of appeals, or by permission of the court of appeals upon refusal by the appellate division or upon direct application:

1. in an action originating in the supreme court, a county court, a surrogate's court, the family court, the court of claims or an administrative agency.

(i) from an order of the appellate division which finally deterines the action and which is not appealable as of right, * * *

* * *

ARTICLE 55, APPEALS—GENERALLY

§5520. Omissions; appeal by improper method

* * *

(b) Appeal by permission instead of as of right. An appeal taken by permission shall not be dismissed upon the ground that the appeal would lie as of right and was not taken within the time limited for an appeal as of right, provided the motion for permission was made within the time limited for taking the appeal.

* * *

Civil Rights Law of 1871; 42 U.S.C. §1983.

§1983. Civil action for deprivation of rights.

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

R.S. §1979. Derived from Act Apr. 20, 1871, c. 22, §1; 17 Stat. 13.

STATEMENT OF THE CASE

The record will disclose that the operative facts of the case are largely undisputed and matters of documentary record.

Petitioner joined the faculty of respondent Fashion Institute of Technology ("FIT") in September 1956 on the second of eight salary steps for Instructor in transferring from a New York City public high school. She taught there continuously full-time thereafter, being given a Certificate of Permanent Tenure on May 15, 1962, and was on the eighth, highest step of the Instructor rank—then equivalent to the third salary step of the rank of Assistant Professor—from September 1962 until she went out on maternity leave effective February 1st, 1963. The maximum maternity and child care leave at that time consisted of one year's leave and one year's extension which she duly requested. Petitioner continued to stay home after January 31, 1965, but in the summer of 1967 she advised the FIT authorities she was ready to resume full time teaching there. On the promise of her department chairman that if petitioner would return to part-time teaching, she would be given the first full-time opening that presented, and, upon certification of FIT's then president to its Board of Trustees, she was restored to staff as an adjunct assistant professor teaching a part-time program in the September 1967 semester, only to be dropped from staff at the end of January 1968 on the pretext that no work was available to her, while the concealed but explicit reality was that she was being dropped to make way for the advancement of untenured people more favored in collective bargaining. Not giving up and persistent in her inquiries for and about the availabilities of work at FIT, petitioner, who had gotten a New York City public high school teaching job starting September 1968, finally retained counsel to assist her in getting reinstated to FIT

faculty. With such assistance petitioner was finally reinstated—for the second time—starting February 1973 as an assistant professor "with a continuation of tenure and seniority." Receiving the pay for the first step of the rank of assistant professor rather than for the fourth step to which she deemed herself entitled, petitioner invoked the grievance procedure provided by collective bargaining culminating in an arbitration proceeding in which her union declined to represent her.

It was only in the course of the arbitration proceeding that an FIT memorandum dated June 22, 1972, drawn to assist the college president in considering petitioner's 1972 application for reinstatement, but relating the reasons for her being dropped from faculty as of January 31st, 1968 was discovered to her from FIT's files. A copy of that memorandum of June 22, 1972 is annexed as Appendix C to this petition. Within a few weeks of that discovery, the arbitrator made his adverse arbitration award dated March 22, 1976.

Claiming violation of her tenure rights under Education Law §2587 (8) and (9) as evidenced by the newly discovered memorandum of June 22, 1972, and praying for "make whole" remediation in rank, pay and back pay from February 1st, 1968, petitioner instituted her administrative appeal under Article VII of the Education Law to respondent Commissioner of Education of the State of New York by petition dated and verified May 4, 1976. There it tarried until September 28, 1977 when the Commissioner made his Decision, copy annexed in Appendix B hereto, dismissing the petition on the ground that he had no jurisdiction, under the doctrine of *Matter of Bowen v. Allen,* 17 AD2d 12, 230 N.Y. Supp. 2d 578 (Appellate Division, 3rd Dept. 1962), *affd. without opinion,* 13 NY2d 663 (1963), to review the matter;

"* * * I conclude that Fashion Institute of Technology is a community college, the actions of which are not subject to review by the Commissioner pursuant to section 310 of the Education Law * * *."

Petitioner next brought a statutory mandamus proceeding against respondents to review and reverse the Commissioner's Decision in the Supreme Court of the State of New York, Albany County. In the petition to that Court, two causes of action were pleaded. The first cause of action sought remand of the matter to the Commissioner with the mandate that he take jurisdiction and decree relief. The second cause of action pleaded was in the alternative;

"FOR A SECOND CAUSE OF ACTION AGAINST RESPONDENT PRESIDENT AND BOARD OF TRUSTEES OF THE FASHION INSTITUTE OF TECHNOLOGY

13. In the event it should be determined that the Commissioner's rejection of jurisdiction herein may not be nullified and set aside, then petitioner, reiterating the allegataions of this petition as though herein set forth fully and at length, claims the right to proceed directly in this Article 78 CPLR proceeding—or amending the same into the format of an action—against respondent President and Board of Trustees of Fashion Institute of Technology, for so much of the relief prayed for herein as would make petitioner whole for violation of her tenure rights under §2587 of the Education Law by said respondent F.I.T. and for its continuing refusal to accord her such rights, all of which acts of refusal and noncompliance with law are capricious, arbitrary, unreasonable and illegal and for all of which court relief no prior application has ever been made."

After argument at Special Term, Supreme Court, Albany County made its memorandum decision of March

3, 1978 herein, copy appended in Appendix B, concluding that:

"* * * the Commissioner's decision with regard to his lack of jurisdiction under Section 310 may not be set aside. aside.

"The petitioner argues that even if jurisdiction under Section 310 is absent, the Commissioner has jurisdiction under Section 308 or Section 2587 (9) of the Education Law. Suffice it to say that the arguments were advanced before the Commissioner, and upon the facts presented his failure to exercise jurisdiction under those sections may not be said to be arbitrary and capricious.

"The petition is dismissed. Submit judgment."

The Special Term final judgment of dismissal, signed by the Court as submitted by the Commissioner, copy appended in Appendix A hereto, went beyond jurisdictional dismissal and dismissed the petition, inclusive of petitioner's second cause of action, on the merits.

On appeal to the Appellate Division, Third Department, petitioner now urged, in addition to the claimed violations of procedural and substantive rights under Education Law §2587, the statutory duty of the Commissioner to exercise a remediating jurisdiction in the case, and the violation of petitioner's Fourteenth Amendment due process rights, that, were the judgment to stand, both petitioner and the statute would be deprived of any means of enforcing the rights and benefits clearly intended to be conferred by the statute. The upshot was the unanimous decision of the Appellate Division of May 17, 1979 affirming the Special Term judgment without opinion, copy appended in Appendix B hereto. The Appellate Division order of affirmance dated and entered June 4, 1979, copy appended in Appendix A to this petition, coupled with the Court of Appeals of the State of New York decision of December 17, 1979, copy appended in Appendix A hereto,

denying petitioner permission to appeal herein from said Appellate Division order of affirmance, constitute the base from which this petition for a writ of certiorari is drawn.

STATEMENT PURSUANT TO RULE 23 (f) OF THE SUPREME COURT RULES

In this case where tenure at FIT is statutorily constructed and defined, its substantive attributes prescribed in painstaking detail, and the implementing procedures for its protection so unambiguously mandated by that same definitive, comprehensive statute, it seems perfectly obvious to us that petitioner's litigating path for the vindication of her vocational rights—the one prescribed by statute and taken by petitioner—was the only valid one open to her; that initiating litigation either in the district court under 42 U.S.C. §1983 or the State Supreme Court in direct invocation of Education Law §2587 would either be premature or fatal to her claims without ever touching upon the backup protection of her Fourteenth Amendment federal due process rights. For Education Law §2587 (9), notwithstanding the Commissioner's professed helplessness to review FIT's actions, plainly reads:

> "9. Persons granted tenure under the provisions of this section shall not be removed except for cause, after a hearing and by a majority vote of the board. * * * the decisions of the board shall be final, except that any person aggrieved may review the determination of said board only by an appeal to the commissioner of education, as provided for by article seven of this chapter. * * *"

And it seems nothing less than sheerest casuistry to urge, as respondents have, that enforcement of the statute can be avoided by the simple expedient of terminating tenured teachers without the requisite hearing.

Given the premise of a State statute prescribing State remedies in which federal due process guarantees could be invoked remedially only for fundamental violations of the statute's requirements, it is not surprising that the main thrust of the proceedings—administrative before the Commissioner, judicial in Special Term and on appeal—was directed towards the correct interpretation of the statute and its application to the facts at hand.

Nevertheless, the peripheral significance of constitutional guarantees was asserted at the very outset in the petition instituting the administrative appeal to the Commissioner:

> "16. The pattern of illegal discrimination against me by F.I.T. violative of section 2587 of the Education Law, of the federal Civil Rights Law of 1964, of decisional rulings and later enactments, and of strong, constitutionally grounded, public policy is unmistakeably established in the secret dropping of me from further employment at F.I.T. after January 1968. * * *"

and the aforesaid petition to the Commissioner was, of course, submitted to Special Term as part of the return in that proceeding for judicial review.

With the Special Term judgment of dismissal on the merits—the denial of *both* administrative and direct judicial powers of enforcement of Education Law §2587, more specific attention was given to the federal constitutional aspects in the appeal to the Appellate Division. Most succinctly, it was thus pressed at pages 2 and 3 of petitioner's reply brief to the Appellate Division:

> "It seems nothing less than obtuse for the Commissioner to misinterpret FIT's January 1968 termination action, flagrantly violative of every line of Education Law, sec. 2587 (8) and of subsection (9) as well, of Zangrillo's human rights under every Human Rights law, and of her pro-

cedural due process rights under the Fourteenth Amendment of the United States Constitution, *Board of Regents v. Roth,* 408 U.S. 564 (1972). * * *"

And in the successive applications, first to the Appellate Division, then to the Court of Appeals direct, for permission to appeal to the Court of Appeals of the State of New York, the motion papers stated the following:

> "10. And even if the Commissioner is shut off by the strictures of *Bowen* from even inquiring whether Zangrillo had tenure of which she could be, wrongfully and in violation of the statute, deprived, we feel the Court of Appeals ought to be given the opportunity to consider whether, as a matter of strong public policy, that is really so, since Mr. Justice Stewart, speaking for his Court in the following respect, said in *Board of Regents v. Roth,* 408 U.S. 564, 577 (1972):
>
> > '* * * Only last year, the Court held that this principle "proscribing summary dismissal from public employment without hearing or inquiry required by 'due process' also applied to a teacher recently hired without tenure or formal contract, but nonetheless with a clearly implied promise of continued employment. Connell v. Higginbotham, 403 U.S. 207, 208.' "

Thus the federal constitutional objection to what had been done below was urged to the New York Court of Appeals. True, under Civil Practice Law and Rules §5601 (b)(1) and (2), an appeal might have been taken to that Court as of right on the ground that either a federal constitutional question of construction was "directly involved"—which we believe to be the case—or the instance—clearly inapplicable here—where the sole issue would be the constitutional validity of a statutory provision. If, speaking practically, the Court of Appeals felt

there was no constitutional question directly involved, dismissal of the appeal would follow with exactly the same effect as a denial of permission to appeal. On the other hand, moving successively for permission to appeal pursuant to Civil Practice Law and Rules §5602 (a)(1)(i) kept open both the statutory issue of the propriety of the interpretation, application, and enforcement of Education Law §2587 *and* the constitutional due process issues raised by petitioner. Clearly the statutory issue, if heard on appeal by the Court of Appeals, could have been resolved in such a way as to leave no claim of constitutional transgression. And if the Court of Appeals felt that the existence of a substantial question of federal constitutionality did indeed figure in the case, then it would have allowed the appeal to proceed as of right under §5520(b) of the Civil Practice Law and Rules. Proceeding by motion for permission to appeal was therefore the more conservative procedure for preserving the maximum spectrum of appeal opportunity. Indeed, under the Rules of the Court of Appeals, on such a motion for permission, the record and briefs below are submitted with the motion papers. Hence the decision of the Court of Appeals denying permission to appeal from the Appellate Division order of affirmance makes it abundantly plain that this petition seeks review from the final judgment rendered by the highest court of the State in which a decision could be had.

ARGUMENT FOR ALLOWANCE OF THE WRIT

i. In this petition invoking the Fourteenth Amendment of the United States Constitution, petitioner claims a deprivation of her due process property rights to her position as a statutorily tenured teacher at the Fashion Institute of Technology, 1) on January 31, 1965 when, without the requisite hearing or charges, she was summarily terminated and severed from the faculty, and 2) follow-

ing shortly upon the discovery that her termination had been made for the statutorily prohibited purpose of making way for the advancement of untenured personnel, she was wrongfully denied any merit adjudication of her claims notwithstanding that the litigating procedures taken were those prescribed by the tenure statute.

Patently the New York Education Law §2587 spells out a "property" interest in tenure at that school which is unusually comprehensive and detailed, and which, unlike the "liberty" interest claimed for the terminated medical school student in *Board of Curators, University of Missouri v. Horowitz,* 435 US 78, 82 (1978), is squarely within the ambit of constitutional protection, per Rehnquist, J.:

> "To be entitled to the procedural protections of the Fourteenth Amendment, respondent must in a case such as this demonstrate that her dismissal from the school deprived her of either a 'liberty' or a 'property' interest. Respondent has never alleged that she was deprived of a property interest. Because property interests are creatures of state law, Perry v. Sinderman, 408 US 593, 599-603, respondent would have been required to show at trial that her seat at the Medical School was a 'property' interest recognized by Missouri state law. * * *"

We are, of course, mindful of *Bishop v. Wood,* 426 US 341, 349, 350 (1976) and its caveat against an inundation of the federal courts with discharge and termination cases claiming violation of federal due process constitutional rights through mere error in the administration of state law. More than the fact that this is a substantial "property" case rather than the considerably amorphous "liberty" case presented by *Bishop v. Wood,* this petitioner's case, we feel, presents such a clearcut showing of gross violation of due process vocational *and* litigating rights as, for a practical matter, to cast dsoubt on the *de*

facto enforceability of the federal vocational constitutional guarantees were it to go back unreviewed to the educational establishment.

Thus petitioner was tenured before she went out on maternity leave effective February 1st, 1963, witness her tenure certificate, copy appended as Appendix D to the petition.

In the words of the arbitrator:*

> "In or about 1967, Mrs. Zangrilio was ready to come back to work full-time, and she so notified the Employer.
>
> "Professor Kopp, the Department Chairman told grievant that she would give her the first available full-time opening, and asked her whether she would, in the meantime, agree to teach a three-hour course once a week.
>
> "Mrs. Zangrillo agreed, and by letter of August 29, 1967 was assigned as Adjunct Assistant Professor in the Apparel Design Department for the Fall semester effective as of September 1967. * * *"

On the certification of the college president to the board of trustees, petitioner was assigned to and taught a part-time program during the September 1967 through January 1968 semester. "At the end of that semester she was dropped, January 31, 1968." (Appendix C)

Again from the arbitrator:

> "When Professor Zangrillo's part-time assignment * * * came to an end in January 1968, she still sought full-

---

* As a matter of State law, grievance arbitration may not override the policy mandate of a statute, least of all a tenure statute.

Union Free School Dist. No. 2 of Cheektowaga v. Nyquist, 38 NY2d 137 (1975)

Binghamton Civil Service Forum v. City of Binghamton, 44 NY2d 23 (1978).

time employment at F.I.T., but without success.

"In the Spring of 1972, having been passed by for reemployment while others were hired, Mrs. Zangrillo retained counsel to assist in pressing her claim for reemployment.

"Some faculty members opposed the grievant's reemployment * * *. The Employer itself took the position that since grievant 'never returned from maternity leave [sic!] . . . the college has no obligation to' her * * *."

In that latter notion, as well as in the sentiment, "Mrs. Zangrillo had given up her rights and seniority voluntarily to stay home" (Appendix C), in the college memorandum discovered to the petitioner in the course of the arbitration, the college authorities were dead wrong. For it had been determined by Commissioner Allen in *Matter of the Appeal of Lelia H. Johnson,* 3 Ed. Dept. Rep. 186 (June 4, 1964; copy appended as Appendix E to this petition) that prolonged absence of a tenured teacher could not be deemed a constructive resignation:

"The characterization of absence as a resignation is contrary to law and to fact. There is no evidence that appellant ever intended to resign. As a teacher on tenure appellant may be removed without her consent only on charges and after a hearing under the provisions of section 3013 of the Education Law.

"Since appellant has not resigned and has not been removed pursuant to section 3013, she is still in the employ of the district * * *."

In New York law a waiver of tenure rights must be freely, knowingly and openly made; it may never be implied, presumed, or constructive.

Matter of Baer v. Nyquist, 34 NY2d 291 (1974)

Clearly to use petitioner's maternity absence as a lever to pry her loose from her tenured position and to turn her career into a shambles *after* her return to faculty in September 1967, was as much a violation of her federal constitutional due process vocational rights as it was morally reprehensible.

Nor can the inability of any State forum, administrative or judicial, to afford petitioner a hearing and an adjudication on the merits of her substantial claim be written off as mere error, or perhaps no error at all. Not to have given the petitioner a forum to hear the merits of her case; indeed, to have denied a forum to her, was, by established constitutional standards, an independent viclation of petitioner's Fourteenth Amendment due process rights.

ii. Should this Court grant the writ, it would have before it a complete record of the case that was submitted to both the Commissioner and Special Term for disposition of the case on the merits. While the Justice sitting at Special Term felt that the Commissioner's mere considered view of statutes urged upon him as dispositive was enough to relieve his disregard of them from being held arbitrary and capricious by the reviewing authority, e.g.,

"The petitioner argues that even if jurisdiction under Section 310 is absent, the Commissioner has jurisdiction under Section 308 or Section 2587 (9) of the Education Law. Suffice it to say that the arguments were advanced before the Commissioner, and upon the facts presented his failure to exercise jurisdiction under those sections may not be said to be arbitrary and capricious." (Appendix B, pp. 9a, 10a)*,

* The Special Term decision made the factual error of asserting that petitioner had appealed to the Commissioner to "restore her to a full-time tenured teaching position." She had been reinstated for the second time in February 1973 with a continuation of tenure, and was seeking, both before the Commissioner and here, a make whole remedy for the consequences in rank, pay and back pay of her wrongful termination of January 31, 1968.

the Commissioner must make his determinations in conformity with the requirements of governing law. Thus in *Board of Education v. Nyquist,* 37 AD2d 642 (1971), affirmed 31 NY2d 468 (1973), the Appellate Division said,

> "And where the Commissioner makes an erroneous determination on a question of law, his decision is, in a legal sense, purely arbitrary.***"

Patently, and by the same token, a Commissioner's decision must meet constitutional requirements.

We feel that *Franks v. Bowman Transportation Co., Inc.*, 424 US 747 (1976) should be the governing authority for the fashioning of a make-whole remedy on remand.

Following the exhaustion of State litigating forums through the highest appellate Court of the State, there is, of course, no doubt whatsoever as to the jurisdiction and power of this Court to sit in review of the federal constitutionality of the acts of the respondents and of the determinations, both administrative and judicial, of the State tribunals. Matched against the aptness of this petitioned forum is the grim fact that the realities of the sheer physical limitations of this Court's ability to handle a caseload force the turning away of the considerable majority of the matters offered regardless of the merits they may possess. Yet the dangers to petitioner's aspirations in invoking the district court under 42 U.S.C. §1893 after so complete a course of State court appellate review makes the bringing of this petition utterly necessary if the constitutional guarantees of her valuable property rights—and constitutional rights, not statutory rights, are all she has left—are to be applied in her behalf. We feel that the importance of individual constitutional rights as against the exercise of government power has always been recognized and acted

upon by this Court, and that, aside from the obvious personal importance of the case to petitioner, the matter has a potentially important jurisprudential impact in building the case law of Fourteenth Amendment due process guarantees with respect to personal property rights.

CONCLUSION

For the foregoing reasons, we earnestly pray that this petition for a writ of certiorari be granted.

Dated: March 13, 1980.

Respectfully submitted,

MILTON HOROWITZ
Counsel for Petitioner
15 Park Row
New York, New York 10038
(212) COrtlandt 7-0606

APPENDIX A
Determinations Sought to Be Reviewed
Decision of New York Court of Appeals Denying
Permission to Appeal, December 17, 1979

Mo. No. 1140

In the Matter of the Application of Frances Leto Zangrillo,
Appellant,

For a Judgment &c.

vs.

Gordon M. Ambach, as Commissioner of Education of the State of New York, et al.,
Respondents.

Motion for leave to appeal denied with twenty dollars costs and necessary reproduction disbursements.

DECISION COURT OF APPEALS DEC. 17, 1979

* * * * * * * * *

Order of Affirmance of Appellate Division, Third Department, June 4, 1979

At a Term of the Appellate Division of the Supreme Court of the State of New York, held in and for the Third Judicial Department, at the Justice Building in the City of Albany, New York, commencing on the 19th day of March, 1979

PRESENT:

HON. A. FRANKLIN MAHONEY, *Presiding Justice,*

HON. LOUIS M. GREENBLOTT; HON. T. PAUL KANE; HON. ROBERT G. MAIN; HON. ANN T. MIKOLL,

Associate Justices

In the Matter of the Application of

FRANCES LETO ZANGRILLO,

Appellant,

For a Judgment under Article 78, CPLR,

-against-

GORDON M. AMBACH, as Commissioner of Education of the State of New York, and the President and Board of Trustees of FASHION INSTITUTE OF TECHNOLOGY,

Respondents.

Frances Leto Zangrillo having appealed from a judgment of the Supreme Court of Albany County, entered on the 10th day of March, 1979, in the office of the clerk of the County of

Albany and said appeal having been presented during the above-stated term of this Court, and having been orally argued by Milton Horowitz, Esq., of counsel for appellant, and by Robert Stone, Esq. (Carol M. Hoffman, Esq., of counsel) of counsel for respondent Gordon M. Ambach as Commissioner of Education of the State of New York, and Marc L. Silverman, Esq., of counsel for respondent Fashion Institute of Technology, and, after due deliberation, the Court having rendered a decision on the 17th day of May, 1979, it is hereby

ORDERED that the judgment so appealed from be affirmed, with costs.

ENTER:

[s] John J. O'Brien, Clerk

DATED AND ENTERED JUNE 4, 1979.

Final Judgment of Supreme Court, Albany County, March 8, 1978

At a Special Term, Part I of the Supreme Court of the State of New York, held in and for the County of Albany, at the County Courthouse in the City of Albany, on the 10th day of February, 1978.

PRESENT:
HON. JOHN T. CASEY, *Justice.*

JUDGMENT—Index No. 667/1978

In the Matter of the Application of

FRANCES LETO ZANGRILLO,

Petitioner,

-against-

GORDON M. AMBACH, as Commissioner of Education of the State of New York, and the President and Board of Trustees of THE FASHION INSTITUTE OF TECHNOLOGY,

Respondents.

Petitioner, FRANCES LETO ZANGRILLO, by her attorney, Milton Horowitz, Esq., having commenced a special proceeding for judgment pursuant to section 7806 of the Civil Practice Law and Rules vacating, annulling and setting aside an administrative determination duly made by GORDON M. AMBACH, as Commissioner of Education of the State of New York, pursuant to the provisions of section 310 of the Education Law dismissing the appeal of FRANCES LETO

ZANGRILLO, the petitioner herein, and said proceeding having regularly come on to be heard before the Hon. John T. Casey at a Special Term, Part I of this Court held at the County Courthouse thereof, located in the City of Albany on the 10th day of February, 1978, and petitioner having duly appeared by Milton Horowitz, Esq., and respondent GORDON M. AMBACH, as Commissioner of Education of the State of New York, having duly appeared by Robert D. Stone, Esq. (James H. Whitney, Esq., of counsel) and respondents President and Board of Trustees of THE FASHION INSTITUTE OF TECHNOLOGY having duly appeared by Phillips, Nizer, Benjamin, Krim and Ballon, Esqs. (Marc L. Silverman, Esq., of counsel) and the issues in the above-entitled proceeding having been duly argued at the call of the calendar.

Now, upon reading and filing of the notice of petition dated the 29th day of December, 1977 and the petition duly verified on the 29th day of December, 1977, together with the exhibits annexed thereto, and the supplementary affidavit for the petition sworn to by Milton Horowitz, Esq. on the 9th day of February, 1978, all in support of petitioner's application for judgment in accordance with her prayer for relief and upon the answer submitted on behalf of respondent AMBACH duly verified on the 25th day of January, 1978 and the answer submitted on behalf of respondents President and Board of Trustees of THE FASHION INSITUTE OF TECHNOLOGY, duly verified on the 3rd day of February, 1978, and upon all the proceedings heretofore had herein; and due deliberation having been given; and a decision of this Court having been made thereon on March 3, 1978 by the Hon. John T. Casey in favor of respondent GORDON M. AMBACH, as Commissioner of Education of the State of New York and the President and Board of Trustees of THE FASHION INSTITUTE OF TECHNOLOGY and against petitioner FRANCES LETO ZANGRILLO, dismissing the petition and directing the entry of judgment as hereinafter provided, it is

ORDERED, ADJUDGED AND DECREED that judgment be entered in favor of respondent GORDON M. AMBACH, as Commissioner of Education of the State of New York and respondents President and Board of Trustees of THE FASHION INSTITUTE OF TECHNOLOGY, dismissing on the merits the petition to review heretofore served herein and the same is hereby dismissed without costs.

ENTER

[s] John T. Casey
Justice of the Supreme Court

Dated: Troy, New York
March 8, 1978

Entered March 10, 1978.

APPENDIX B

Decision of Appellate Division, Third Department, Unanimously Affirming Final Judgment, Without Opinion, May 17, 1979

May 17, 1979 70 AD2d 790, 416 N.Y. Supp. 2d 159 34286

In the Matter of FRANCES LETO ZANGRILLO,
Appellant,

v.

GORDON M. AMBACH, as Commissioner of Education of the State of New York, et al.,
Respondents.

Appeal from a judgment of the Supreme Court at Special Term (Casey, J.), entered March 10, 1978 in Albany County, which dismissed petitioner's application, in a proceeding pursuant to CPLR Article 78, seeking to set aside a determination of the Commissioner of Education that he lacked jurisdiction to review a controversy between petitioner and respondent Fashion Institute of Technology.

Judgment affirmed, with costs. No opinion.

MAHONEY, P.J., GREENBLOTT, KANE, MAIN and MIKOLL, JJ., concur.

Special Term, Albany County
Supreme Court Decision, March 3, 1978

STATE OF NEW YORK
SUPREME COURT COUNTY OF ALBANY

In the Matter of the Application of

FRANCES LETO ZANGRILLO,

Petitioner,

-against-

GORDON M. AMBACH, as Commissioner of Education of the State of New York, and the President and Board of Trustees of THE FASHION INSTITUTE OF TECHNOLOGY,

Respondents.

(Supreme Court, Special Term, Albany County, February 10, 1978) (Justice John T. Casey, Presiding)

APPEARANCES: MILTON HOROWITZ, ESQ., Attorney for Petitioner, 15 Park Row, New York, New York 10038

ROBERT D. STONE, ESQ., Attorney for Respondent Commissioner of Education of the State of New York, State Education Building, Albany, New York 12234

PHILLIPS, NIZER, BENJAMIN, KRIM & BALLON, ESQS., Attorneys for Respondent Fashion Institute of Technology, 40 West 57th Street, New York, New York 10019

MEMORANDUM

CASEY, J.

The petitioner has instituted an Article 78 Proceeding wherein she seeks a judgment setting aside a determination of the Commissioner of Education of the State of New York.

In 1977 pursuant to Section 310 of the Education Law the petitioner commenced an appeal before the Commissioner of Education wherein she claimed that one of the respondents, The Fashion Institute of Technology, violated the provisions of Section 2587 of the Education Law. In that appeal the petitioner sought an order directing The Fashion Institute of Technology to, among other things, restore her to a full-time tenured teaching position.

The Commissioner determined that the Fashion Institute of Technology was not a part of the common school system but was a community college. The Commissioner noted that Section 310 of the Education Law granted him jurisdiction to hear controversies concerning schools within the common school system, Consequently, the petition was dismissed upon the ground that the Commissioner lacked subject matter jurisdiction.

The jurisdiction of the Commissioner of Education under Section 310 of the Education Law is limited to matters within the common school system. Education Law, §310 (7); *Matter of Bowen v. Allen,* 17 App.Div. 12, aff'd without opinion 13 N.Y.2d 665. Nothing in the papers presented indicate that the Commissioner was arbitrary or capricious in determining that The Fashion Institute of Technology was not within that system. Accordingly, the Commissioner's decision with regard to his lack of jurisdiction under Section 310 may not be set aside.

The petitioner argues that even if jurisdiction under Section 310 is absent, the Commissioner has jurisdiction under Section 308 or Section 2587 (9) of the Education Law. Suffice it to say that the arguments were advanced before the Commissioner, and upon the facts presented his failure to exercise jurisdiction

under those sections may not be said to be arbitrary and capricious.

The petition is dismissed. Submit judgment.

Dated: Troy, New York
March 3, 1978.

Commissioner's Decision No. 9511, September 28, 1977
New York Education Department Reports
17 Ed. Dept. Rep. 98

In the Matter of the appeal of FRANCES LETO ZANGRILLO from action of the President and Board of Trustees of Fashion Institute of Technology with regard to salary.*

Decision No. 9511

(September 28, 1977)

Milton Horowitz, Esq., attorney for petitioner

Phillips, Nizer, Benjamin, Krim and Ballon, Esqs., attorneys for respondents, Marc L. Silverman, Esq., of counsel

AMBACH, Commissioner.—This appeal concerns the appropriate placement of petitioner on the salary schedule for assistant professors employed by the Fashion Institute of Technology.

Respondents contend that this appeal may not be brought to the Commissioner of Education pursuant to the provisions of Education Law §310. The jurisdictional basis for this appeal, if any, must be found in that portion of §310 which provides:

> Such appeal or petition may be made in consequence of any action:
>
> * * *

> By any other official act or decision of any officer, school authorities, or meetings concerning any other matter under this chapter, or any other act pertaining to common schools.

This provision was construed by the Appellate Division in *Matter of Bowen et al. v. Allen* (17 AD2d 12, 14, 230 NYS2d 578, aff'd without op 13 NY2d 663, 240 NYS2d 991 (1963) as follows:

> Although the clause "concerning any other matter under this chapter" could literally, and if it stood alone, embrace much more than the common school classifications of the first six subdivisions, the words "concerning any other matter under this chapter" do not stand alone, and words are circumscribed and modified by the contextual words which precede and follow them.

The court concluded that the Commissioner of Education correctly determined that he lacked jurisdiction to hear an appeal involving the dismissal of professional employees of the State University College of Long Island.

The initial question presented by this appeal is whether the Fashion Institute of Technology is a part of the common school system. On April 21, 1944, the Educational Foundation of the Apparel Industry received an absolute charter from the Board of Regents for the purpose of assisting the New York City Board of Education in planning, establishing and maintaining a fashion institute of technology and design. In accordance with the provisions of Education Law §6302(2), the Board of Trustees of the State University of New York approved the New York City Board of Education as the local sponsor of a community college, to be known as the Fashion Institute of Technology. This institution receives financial support from the local sponsor and the Educational Foundation for the Fashion Industries, which is the amended corporate name of the former Educational Foundation for the Apparel Industry. Fashion Institute of Technology is governed by its own board of trustees,

in accordance with the provisions of Education Law §6306(1) and (3).

Chapter 332 of the Laws of 1975 transferred jurisdiction and control of eight community colleges in the City of New York from the State University of New York to the City University of New York, which is a part of the common school system pursuant to Education Law §6202(1). However, the jurisdiction and control of Fashion Institute of Technology by its own board of trustees, subject to supervision by the Board of Trustees of the State University, was not altered by Chapter 332.

In view of the foregoing, I conclude that Fashion Institute of Technology is a community college, the actions of which are not subject to review by the Commissioner pursuant to Education Law §310 (*Matter of Roode,* 9 Ed Dept Rep.65 (1969). Consequently, this appeal msut be dismissed.

THE APPEAL IS DISMISSED.

**Zangrillo v. Ambach et al.;* Supreme Court, Albany County, Special Term; Casey, J., judgment granted dismissing petition to review; 3/3/78; n.o.r.

APPENDIX C

Memorandum to College President, June 22, 1972

FASHION INSTITUTE OF TECHNOLOGY

227 West 27th Street, New York, N.Y.

June 22, 1972

TO: President Feldman

Mrs. Zangrillo's separation from the college commenced February 1, 1963 through a maternity leave until January 31, 1964. She asked for and received an extension for one year — 21/64 — 1/31/65.

August, 1967 — more than 2-1/2 years after expiration of the extension, she taught 1-1/2 courses, total 3 hours per week, on a Part-Time basis in the Fall 1967 semester, as an Adjunct Asst. Prof. At the end of that semester, she was dropped, January 31, 1968.

The By-Laws in effect stated:

> "Faculty Members who resign shall be eligible for re-instatement in the same rank within 10 years, and re-employment by the President within his discretion."

Therefore, in its most favorable light:

1. If re-instatement were considered — the rank which she held upon resignation if it was 1968.
2. In using Presidential discretion in consideration of re-instating her, he has to get advice from educational advisors of the department.

(Above information from Mr. Gershon)

The chairman at that time was Prof. Erna Kopp, who retired in 1969. When contacted on June 21, 1972, Prof. Emeritus Kopp stated:

Mrs. Zangrillo came in to fill the need for an instructor for a 3 hour class for that one semester. After that semester, there were no classes available, for it was felt that Mrs. Zangrillo had given up all her rights, including seniority, upon expiration of the extension of maternity leave. Any department courses which were available, were being given to Part-Time people who had been there longer and had continued to teach, up to that period of time. In addition, Prof. Kopp said that Mrs. Zangrillo had been out of industry so long, and the Fashion Industry is one in which current experience *and* contact is very important for the students.

The Assistant Chairman was Prof. Vittorina Rolfo, who retired in 1969. When contacted on June 19, 1972, Prof. Emeritus Rolfo stated:

Mrs. Zangrillo taught that one course and since her maternity leave had expired, much time had passed, and Mrs. Zangrillo had given up her rights and seniority voluntarily to stay home. The other Part-Time members of the department were felt to have seniority if any full-time openings became available, and for any course offerings. In addition, several evening instructors had been offered daytime teaching opportunities as they became available, and were being trained to come in, especially those who were still in industry in the daytime while teaching at night.

Prof. Kopp also mentioned that Dean Snyder, who was Dean of Faculty at that time, 1963-1965, handled maternity leave applications.

Mrs. Zangrillo has been teaching at Maxwell Vocational High School on a substitute basis recently.

Attached is a copy of Mrs. Zangrilo's background.

(Prof.) Hilda Friedman
Chairman, Fashion Design Department

APPENDIX D

Tenure Certificate, May 15, 1962

FASHION INSTITUTE OF TECHNOLOGY May 15, 1962

CERTIFICATE
OF
PERMANENT TENURE

Mrs. Frances Zangrillo
461 Autumn Avenue
Brooklyn 8, N.Y.

Dear Mrs. Zangrillo:

This is to CERTIFY that the Board of Trustees, at its meeting held on May 14, 1962, has determined that you have satisfied the requirements of the Education Law and the regulations of the College for entitlement to tenure in the following rank and subject field:—

Tenure Rank: Instructor
Subject Field: Apparel Design

Your date or ogiginal appointment to a position eligible for tenure: September 1, 1959.

You are now a member of *the permanent instructional staff* of the College.

This *CERTIFICATE OF PERMANENT TENURE* is being issued to you in accordance with Section 2587, subdivision 5, of the Education Law which is the F.I.T. Tenure Law.

You have our congratulations and very best wishes.

BOARD OF TRUSTEES OF THE
FASHION INSTITUTE OF TECHNOLOGY

[S E A L]

By [s] MORRIS W. HAFT
Chairman of the Board

[s] LAWRENCE L. BETHEL
President

ATTEST:
[s] SHIRLEY GOODMAN
Secretary

APPENDIX E

New York State Education Department Report,
Matter of Lelia H. Johnson, June 4, 1964
Decision No. 7356
3 Ed. Dept. Rep. 186

In the Matter of the Appeal of Lelia H. Johnson from Action of Board of Education, Central School District No. 1, Towns of Penfield, Perinton and Brighton, Monroe County, and Walworth and Macedon, Wayne County, Determining That Appellant Had Resigned Her Position as Teacher and Denying Tenure Rights.

Decision No. 7356

(June 4, 1964)

TEACHER (tenure) (resignation)—EDUCATION LAW, §3013 Respondent attempted to constitute appellant's gross absence from teaching duties as resignation—not legally proper—no evidence appellant intended to resign—may be removed only on charges and after hearing—appeal sustained.

Antell, Potter and Harris, Esqs., attorneys for appellant
Breman, Centner and Palermo, Esqs., attorneys for respondent
John E. Glenn, Esq., attorney for New York State Teachers Association, *amicus curiae*

ALLEN, JR., Commissioner.—Appellant is a teacher on tenure employed by respondent, who, due to illness taught only a few days in the four school years from 1959-60 through 1962-63. On September 24, 1963 respondent Board adopted a resolution reading, in part:

> "That the performance of regular teaching duties by a teacher for only 27 days in four years and only 3 days in the past three years, without a leave of absence granted by the Board of Education, whether for reasons of health or

otherwise, constitutes a resignation in fact from the position of teacher in this school system."

Respondent refused to assign a class to appellant and permit her to return to active teaching duty in September, 1963 although she asserted she was willing and able to do so and although she submitted a letter from her physician stating she was physically able.

The characterization of absence as a resignation is contrary to law and to fact. Resignation must be a voluntary and deliberate act. There is no evidence that appellant ever intended to resign. As a teacher on tenure appellant may be removed without her consent only on charges and after a hearing under the provisions of section 3013 of the Education Law.

Since appellant has not resigned and has not been removed pursuant to section 3013, she is still in the employ of the district and the fact that the respondent did not assign her to a class does not defeat her right to such pay as she may have earned (*Matter of Boyd v. Collins,* 11 N.Y. 2d, 228).

The appeal is sustained.

IT IS ORDERED that the Board resolution of September 24, 1963 relating to appellant's purported resignation be and the same hereby is set aside; and it is further

ORDERED that the respondent correct its records to indicate that appellant has continued to be and is still employed as a teacher on tenure; and it is further

ORDERED that respondent pay appellant's salary from the opening of school in September 1963 until appellant's employment is terminated in accordance with law, less any amounts appellant may have earned from other employment during such period.